

properly be classified as reimbursable costs for regulating "Radio Facilities" under Part 25 of its Rules.

Faced with these difficulties, the FCC argues that the issues in this proceeding have already been decided by this Court. It reads the 1999 *PanAmSat* decision, which carefully avoided addressing whether COMSAT must pay Section 9 fees on account of INTELSAT satellites, as virtually compelling the imposition of such fees on COMSAT. The FCC does so by reiterating the truism that COMSAT is not "exempt" from paying Section 9 fees. COMSAT agrees: it is not "exempt." Indeed, COMSAT has paid millions of dollars in such fees on a variety of facilities subject to Section 9. But the question here is whether INTELSAT satellites—which the FCC admits it does not regulate—may serve as the basis for imposing additional Section 9 fees on COMSAT.

Despite the care with which the *PanAmSat* Court sought to steer away from deciding this issue, there are some statements in *PanAmSat* which could be read as indicating that INTELSAT facilities are subject to Section 9 fees. Those statements are *dicta* and, in some cases, are factually incorrect. For instance, the Commission repeatedly cites the *PanAmSat* Court's passing observation that it is "hard to see" why, if COMSAT must pay Section 8 application fees for INTELSAT satellites, it is not also subject to Section 9 regulatory fees for the

same facilities. In most cases, such an assumption would be reasonable, but in this context it is mistaken.

Ordinarily, the filing of a space station application would suggest that the space station thereafter would be subject to continuing regulatory oversight. That is certainly true with respect to facilities licensed pursuant to 47 C.F.R. Part 25. But it is *not* true in the case of space stations operated by INTELSAT. Rather, in its FCC applications, COMSAT merely seeks review of its investment in INTELSAT satellite and launch vehicle procurements. The cost of that review is covered by Section 8 application fees, and the Commission incurs no additional costs after it reviews the applications because it lacks jurisdiction over the subject facilities.

The FCC treats the *PanAmSat* case as if it overruled the Court's earlier decision in *COMSAT*. It did not. Thus, the Court is now faced with the task of harmonizing its two prior decisions. This can best be accomplished by focusing first on the text of Section 9—as the *PanAmSat* Court directed when it rejected the FCC's position on the basis that the agency's analysis elevated legislative history over statutory text. Once this task is undertaken, it quickly becomes apparent that the FCC cannot square the imposition of space station fees on INTELSAT satellites with the statutory language limiting such fees to "Space Station[s] (per

operational station in geosynchronous orbit) (47 CFR Part 25).” 47 U.S.C. § 159(a) (1994 & Supp. 2000).

The Commission tries to dismiss the Part 25 parenthetical as a meaningless “clerical” notation. But that is not how courts read statutes. Moreover, the FCC has failed to explain why, if the Part 25 parenthetical does *not* limit imposition of space station fees to satellites subject to the FCC’s jurisdiction, the agency must not also impose those fees on other non-U.S. satellites.

Finally, even if there is a justification for imposing space station fees on COMSAT in connection with INTELSAT satellites, the FCC has failed to justify its refusal to prorate those fees to reflect that, unlike other payers of this fee, COMSAT does not own or operate the satellites upon which it is being called to pay fees, and it and uses only 17 percent of those satellites’ capacity.

ARGUMENT

I. THE FCC IS STATUTORILY PRECLUDED FROM IMPOSING SECTION 9 SPACE STATION FEES ON INTELSAT SATELLITES.

In *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), this Court was asked to decide whether COMSAT is “exempt” from paying Section 9 space station fees. See FCC Br. at 23-24 (quoting question presented in *PanAmSat*). The Court correctly answered “no.” See *infra* Section II (analyzing *PanAmSat*

decision). Now, the FCC, as well as Intervenor PanAmSat, would have this Court believe that the instant case raises, once again, the identical issue decided in *PanAmSat*: namely, whether COMSAT is exempt from paying Section 9 fees. See, e.g., FCC Br. at 18-19, 22-24, 27; see also PanAmSat Br. at 5-7, 12.² It does not. Rather, the question presented here is whether Section 9 *precludes* the FCC from imposing space station fees on unregulated INTELSAT satellites. For the following reasons, the answer is “yes.”³

² Indeed, PanAmSat (though not the FCC) asserts that COMSAT’s appeal is barred by the doctrines of *res judicata* and collateral estoppel. PanAmSat Br. at 6. PanAmSat is wrong. Because no Court has ever considered the merits of COMSAT’s present statutory arguments, “there is no possibility that *issue* preclusion would bar them.” *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 77-78 (D.C. Cir. 1997) (emphasis in original) (citation omitted). Rather, “the lack of [past] merits consideration defeats any application of issue preclusion.” *Id.* at 78. Moreover, “[t]he general principle of *claim* preclusion . . . that a final, valid judgment on the merits precludes any further litigation *between the same parties* on the same cause of action” cannot apply where COMSAT was not notified of—and did not participate in—the *PanAmSat* proceeding. *Id.* (emphasis added); see also *Restatement (Second) of Judgments* §§ 17, 24 (1982) (same). Even if COMSAT had participated in *PanAmSat*, claim preclusion would not bar the present proceeding because *PanAmSat* concerned the FCC’s assessment of regulatory fees for fiscal year 1998, but the present litigation concerns regulatory fees for fiscal year 2000. It is axiomatic that “each successive enforcement of a statute—such as each year a taxpayer is subjected to a tax—creates a new cause of action.” *Stanton*, 127 F.3d at 78.

³ The FCC’s brief abandons any reliance on the ORBIT Act as an independent basis for imposing any liability on COMSAT. See FCC Br. at 19 (acknowledging that “COMSAT’s liability for the fee arises from Section 9—not
(continued)

A. The FCC Does Not Regulate INTELSAT's Satellites As "Radio Facilities," And Thus Incurs No Costs As The Result Of Such Regulation.

The Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order, 15 F.C.C. Rcd 14478, 65 Fed. Reg. 44576 (2000) ("FY 2000 Order") (J.A. 2), does not identify *any* Section 9 costs that arise from the FCC's regulation of INTELSAT satellites. Nor could it, for there are none. As explained in COMSAT's Initial Brief, Section 9's text unambiguously imposes space station fees only on "radio facilities" regulated pursuant to "47 CFR Part 25." 47 U.S.C. § 159(g) (table) (1994 & Supp. 2000). The FCC, however, does not regulate INTELSAT's "radio facilities"—pursuant to "47 CFR Part 25" or otherwise. COMSAT Br. at 27-32; *see FY 2000 Order*, 15 F.C.C. Rcd at 14487 (J.A. 7) ("INTELSAT's facilities are not subject to the licensing provisions of Part 25.").

Indeed, during the time period at issue here, the FCC was *precluded by law* from regulating INTELSAT satellites. In particular, the International Organizations Immunities Act ("IOIA") explicitly provides that:

International organizations, *their property and their assets, wherever located, and by whomsoever held*, shall enjoy the same immunity . . . as is enjoyed by foreign governments. . . .

from the ORBIT Act"); *accord id.* at 37. Thus, the only remaining contested issue is the FCC's power to impose these fees under Section 9.

22 U.S.C. § 288a(b) (1994 & Supp. 2000) (emphasis added): *see also* Exec. Order No. 11996, 42 Fed. Reg. 4331 (Jan. 24, 1977) (designating INTELSAT as an immune international organization). It is beyond dispute that the INTELSAT satellites are "property" and "assets" owned not by COMSAT but by the immune international organization INTELSAT. *Compare Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT,"* Art. V(a), done Aug. 20, 1971, 23 U.S.T. 3813, 3822 ("INTELSAT Agreement") ("INTELSAT shall be *the owner* of the INTELSAT space segment and of all other property acquired by INTELSAT.") (emphasis added) *with id.* Art. V(b), 23 U.S.T. at 3823 (COMSAT merely "shall *have an investment share*" in INTELSAT) (emphasis added). Thus, INTELSAT satellite "assets" are immune under IOIA from regulatory oversight and national taxation (including regulatory fees), even if, *arguendo*, these assets can be said to be "held" by COMSAT. *See* COMSAT Br. at 4-5, 9-11 (discussing 22 U.S.C. § 288 *et seq.*): *see also* INTELSAT Agreement, Art. XV(b), 23 U.S.T. at 3855 ("INTELSAT and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation and from customs duties on communications satellites and components and parts for such satellites to be launched for use in the global system.").

Section 9 contains no suggestion that Congress intended to abrogate or repeal either the IOIA or the INTELSAT Agreement.⁴ Accordingly, this Court should decline the FCC's invitation to construe Section 9 as having repealed by implication both of those enactments. *Cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) ("superior values, of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws, prompt the . . . rule that legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, absent a clearly expressed congressional intention to the contrary") (internal quotations omitted).

B. The FCC May Not Reinstate, Under A Different Name, The Same Unlawful "Signatory Fee" That This Court Previously Struck Down.

The FCC's brief makes clear that the costs it seeks to recover by imposing space station fees on INTELSAT satellites are not the same costs that it incurs in

⁴ Indeed, if the statute were ambiguous on this point, the legislative history makes plain Congress's intent that Section 9 should be construed harmoniously with the IOIA and the INTELSAT Agreement. See H.R. Rep. No. 102-207, at 26 (1991) (Section 9 regulatory "[f]ees will not be applied to space stations operated by international organizations subject to the [IOIA]."), *incorporated by reference* in Conf. Rep. H.R. Rep. No. 103-213, at 499 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1188 (emphasis added).

regulating U.S.-licensed satellites.⁵ Rather, they are the same costs of overseeing COMSAT's Signatory activities that it previously sought to recover, and that this Court invalidated in *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997).⁶ FCC Br. at 23 ("the Commission has repeatedly pointed out that it incurs expenses relating to Comsat's signatory status"); *id.* at 22 (noting that the Commission incurs costs overseeing COMSAT's activities as U.S. Signatory); *see FY 2000 Order*, 15 F.C.C. Rcd at 14489 (J.A. 8) ("the costs attributable to space station oversight include costs directly related to INTELSAT signatory activities [and] . . . are distinct from those recovered by other fees that Comsat pays, such as application fees, fees applicable to international bearer circuits, fees covering Comsat's non-Intelsat satellites, and earth station fees"); *see also FCC Report to*

⁵ As explained in COMSAT's Initial Brief, at 27-29, the FCC regulates U.S.-licensed satellites pursuant to Part 25 primarily by ensuring compliance with technical standards and by assigning particular satellites to particular orbit locations. It performs none of these functions with respect to INTELSAT satellites.

⁶ Significantly, the FCC has made no recent effort to quantify the costs of its Signatory oversight. The last time it did so, in 1996, those costs amounted to only \$233,425. *Assessment and Collection of Regulatory Fees For Fiscal Year 1996, Report and Order*, 11 F.C.C. Rcd 18774, 18790 (1996), *rev'd in other respects*, *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997).

Congress as Required by The Orbit Act. FCC 01-190 (June 15, 2001)
§ 1.B.Regulatory Fees (J.A. 240) (same).

The FCC treats this Court's recent *PanAmSat* decision as having overruled its earlier decision in *COMSAT*. But see *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court."). But *PanAmSat* did not reverse this Court's holding in *COMSAT* that Section 9 allows the FCC to impose new regulatory fees only "to reflect additions, deletions, or *changes in the nature of its services* as a consequence of Commission rulemaking proceedings or changes in law." *COMSAT Corp.*, 114 F.3d at 225 (quoting 47 U.S.C. § 159(b)(3) (1994)) (emphasis added); cf. *id.* (Section 9's requirement of a nexus between new regulatory fees and new regulatory services "clearly limits the Commission's authority to promulgate amendments under [Section 9]"). To the contrary, the *PanAmSat* Court *confirmed* that a decision to subject new payers to existing fees is only "justifiable on the basis of changes in the Commission's service that flow from earlier rulemakings." *PanAmSat*, 198 F.3d at 898 (holding that the agency could subject non-common carriers to Section 9 bearer circuit fees only in light of

regulatory changes permitting the “steady expansion of services” offered by the entities and a concomitant increase in the need for FCC oversight).

Here, the FCC cannot and does not claim that it provided any new regulatory services in fiscal year 2000 with respect to COMSAT’s activities, nor does it contend that there were any relevant “changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.” 47 U.S.C. § 159(b)(3) (1994 & Supp. 2000). Instead, the agency seeks to dismiss *COMSAT* by claiming that the decision focused on the procedures by which the FCC adopted the Signatory fee. FCC Br. at 32. But the problem the Court identified in *COMSAT* was not the procedures employed—which were identical to those used to promulgate the *FY 2000 Order*—but rather the FCC’s lack of power to promulgate a new fee in the absence of a change in regulatory service provided by the agency.

Although the FCC concedes that it cannot “adopt a *new fee* in the absence of compliance with the requirements of Section 9(b)(3).” FCC Br. at 32 (emphasis in original), it now argues that *no* fee is “new” unless it has a new *name*. FCC Br. at 32. Under the FCC’s reading of *COMSAT*, the only error reversed in that case was the agency’s decision to *call* its novel 1996 fee a “Section 9 signatory fee” rather than a “Section 9 space station fee.” *See id.* 32-33. This Court should not

countenance such linguistic sleight-of-hand. Where, as here, "both logic and . . . precedent rebut the claims of any such niggardly interpretation" of a law, this Court has rejected governmental "depend[ence] upon such trivial semantic distinctions . . . [to] sidestep [the law's] application." *United States v. Hubbell*, 167 F.3d 552, 581 (D.C. Cir. 1999), *aff'd*, 530 U.S. 27 (2000).

INTELSAT satellites have served the United States during the entire period in which Section 9 space station regulatory fees have been assessed. Moreover, COMSAT has been the U.S. Signatory to INTELSAT throughout that entire period, and the Commission has continuously regulated COMSAT's Signatory activities in precisely the same manner. *See COMSAT Corp., Petition Pursuant to Section 10(c) of the Communications Act for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking*, 13 F.C.C. Rcd 14083, 14088-089 (1998). Under these circumstances, the fee here is inescapably a "new fee," albeit one imposed under an old name. *Cf. United States v. Hatter*, 121 S. Ct. 1782, 1793-94 (2001) (federal judges were unconstitutionally subjected to "new" income tax when 50-year-old Social Security tax was applied against them for the first time in 1983); *Chase Manhattan Bank v. Finance Admin. of City of New York*, 440 U.S. 447, 448-49 (1979) (national banks were unlawfully subjected to "new" property tax when preexisting city commercial rent and occupancy tax was applied

against them for the first time in 1971).⁷ The FCC may seek to avoid characterizing this novel assessment as a "new fee," but "[a]rtful phrasing does not suffice" to avoid established legal requirements. *Hubbell*, 167 F.3d at 581.

C. The FCC May Not Lawfully Impose Fees On COMSAT (But Not On Other, Similarly Situated Companies) By Making A Wholly Artificial Distinction Between "Foreign-Licensed Satellites" And "Non-U.S.-Licensed" Satellites.

The FCC contends that the statutory language imposing space station regulatory fees only on "radio facilities" licensed by the FCC pursuant to "47 CFR Part 25" is "essentially clerical" and does *not* "reflect a substantive limitation" on the scope of Section 9. *FY 2000 Order*, 15 F.C.C. Rcd at 14487-488 (J.A. 7). But if that were true, such fees logically would need to be imposed on every one of the more than 200 geostationary space stations that orbited the earth in 2000. *See* COMSAT Br. at 8. By definition, every such space station is a "Space Station[s] (per operational station in geosynchronous orbit)." 47 U.S.C. § 159(g) (table). Thus, if the reference to Part 25 were not substantive, "[t]he plain terms of § 9," to paraphrase the *PanAmSat* Court, "clearly [would] not *require* an exemption for

⁷ *See also Citibank, N. A. v. New York City Finance Admin.*, 372 N.E.2d 789, 791 (N.Y. 1977) (noting that the New York City commercial rent and occupancy tax at issue was enacted in 1963, but not applied against national banks until 1971).

[operational foreign space stations in geosynchronous orbit], and there [would be] no obvious hook in the language on which to hang an exemption.” *PanAmSat*, 198 F.3d at 895 (emphasis in original).⁸

The FCC, of course, does not seek to assess Section 9 regulatory fees on every satellite orbiting the earth. It does not even seek to impose Section 9 fees on those foreign-licensed satellites that actually serve the United States. This is true even though the FCC undoubtedly incurs costs in creating and maintaining the regulatory regime under which those space stations are allowed to access the U.S. market. See COMSAT Br. at 34-35 & n.18; see also *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, Report and Order*, 12 F.C.C. Rcd 24094 (1997), modified on reconsideration in other

⁸ The FCC cannot ignore the reference to Part 25 merely because it appears in a parenthetical. See *Duquesne Light Co. v. EPA*, 698 F.2d 456, 467 (D.C. Cir. 1983) (rejecting statutory interpretation that “would render the parenthetical superfluous”); *Ass'n of American R.R. v. ICC*, 564 F.2d 486, 495 (D.C. Cir. 1977) (dismissing interpretation that “renders the parenthetical limitation surplusage”). Moreover, the argument that the statutory phrase “47 CFR Part 25” might be characterized as a “technical term” or “term of art” does not vest the FCC with special discretion to “interpret” the provision out of existence. See *Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) (“[T]he presence of a difficult question of statutory construction does not necessarily render that provision ambiguous for purposes of *Chevron*.”).

respects, 15 F.C.C. Rcd 7207 (1999), *corrected by*, 15 F.C.C. Rcd 5042 (2000), *petition for review pending*, No. 98-1011 (D.C. Cir. filed Jan. 12, 1998); *New Skies Satellites, N.V.*, FCC 01-107, 2001 WL 300717 (Mar. 29, 2001) (authorizing 5 existing plus one planned Netherlands-licensed satellites to serve the United States); *European Telecommunications Satellite Organization*, DA 00-1741, 2000 WL 1154045 (FCC Aug. 11, 2000) (authorizing two French-licensed satellites to serve the United States). Nor are Section 9 fees imposed on U.S. companies that own interests—even controlling interests—in foreign-licensed satellites. *See* COMSAT Br. at 34-35. Yet COMSAT, a 20 percent shareholder and 17 percent user of INTELSAT, is being asked to pay space station fees on every satellite in the INTELSAT system.

The *FY 2000 Order* seeks to justify this disparate treatment by concocting a distinction between *foreign*-licensed satellites (which remain outside the coverage of Section 9, according to the FCC) and “other” *non-U.S.*-licensed satellites (*i.e.*, INTELSAT alone), which are now purportedly subject to fees. *See* COMSAT Br. at 32-37 (discussing *FY 2000 Order*, 15 F.C.C. Rcd at 14487-488 (J.A. 7)). But there is no language in Section 9—or anywhere else—to support this strained distinction. This Court should not countenance a statutory interpretation which can only be arrived at by treating COMSAT differently from all other similarly

situated companies. As the Supreme Court recognized in *United States v. Clark*, 445 U.S. 23, 27-31 (1980), a statute must be construed to apply similarly to similarly situated persons. Any other interpretation "raises serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes." *Id.* at 31. See *Justin v. Jacobs*, 449 F.2d 1017, 1022 (D.C. Cir. 1971) (interpreting statutes to avoid different application to similarly situated persons); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987) (recognizing "the importance of treating parties alike . . . when the agency vacillates without reason in its application of a statute or the implementing regulations").

II. THE PANAMSAT COURT DID NOT DECIDE WHETHER SECTION 9 REQUIRES COMSAT TO PAY REGULATORY FEES IN CONNECTION WITH INTELSAT SPACE STATIONS.

To justify its imposition of space station fees on COMSAT, the FCC misinterprets the *PanAmSat* decision throughout its brief. For example, the Commission asserts that the *PanAmSat* Court "concluded" that COMSAT must pay Section 9 space station fees "for its participation in the Intelsat system." FCC Br. at 7. This effort to treat *PanAmSat* as having resolved the question of Section 9's application to INTELSAT satellites flies in the face of the *PanAmSat* Court's deliberate decision to narrow its ruling.

A. Although It Directed The FCC To Analyze Section 9's Text Before Resorting To Legislative History, *PanAmSat* Did Not Purport To Adopt Any Definitive Interpretation Of Section 9.

In *PanAmSat*, this Court did *not* hold that Section 9 compelled COMSAT to pay regulatory fees on account of INTELSAT's satellites. Rather, the Court chastised the FCC for interpreting Section 9 without reference to the statute's text. *See PanAmSat*, 198 F.3d at 894 (criticizing "[t]he Commission's theory . . . that exemption is commanded by the statute's 'plain legislative history,' though not by the text itself"). Accordingly, the *PanAmSat* Court directed the agency to perform a more thorough text-based analysis of the controlling statutes to determine whether COMSAT must pay Section 9 regulatory fees in connection with INTELSAT space stations. *Id.* at 896-97. In so doing, the Court specifically acknowledged the possibility that "there is some ambiguity in the coverage of the 'space station' category in § 9." *Id.* at 896.

The *PanAmSat* Court expressed some preliminary thoughts concerning the issues that it directed the FCC to address, which it made clear were *dicta*. Some of these observations are uncontroverted. For example, the *PanAmSat* Court opined that "[t]he plain terms of § 9 . . . do not *require* an exemption for Comsat, and there is no obvious hook in the language on which to hang an exemption." *Id.* at 895 (emphasis in original). As discussed in Part I. *supra*, COMSAT agrees that it

is not "exempt" from paying Section 9 regulatory fees. Indeed, COMSAT acknowledges liability for \$703.975 in Section 9 regulatory fees in fiscal year 2000.⁹ The ultimate mandate of *PanAmSat*, however, was for the FCC to identify and analyze the relevant statutory language concerning whether INTELSAT space stations fall within Section 9's coverage. This the agency failed to do.

B. The FCC May Not Rely On *Dicta* In *PanAmSat* As A Substitute For Performing The Statutory Analysis Mandated By The *PanAmSat* Court.

Instead of undertaking the textual analysis required by the *PanAmSat* Court, the FCC contends that COMSAT must pay the fees at issue simply because *PanAmSat* vacated the *Assessment and Collection of Regulatory Fees For Fiscal Year 1998, Report and Order*, 13 F.C.C. Rcd 19820 (1998), modified by, *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), in which such fees were not assessed. But as Chief Justice Marshall observed almost two centuries ago:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The

⁹ Under protest, COMSAT paid a total of \$2,313,025 in Section 9 regulatory fees for fiscal year 2000. COMSAT Br. at 12, 20. Of this amount, \$1,609,050 is attributable to the 17 INTELSAT satellites that were operational in fiscal year 2000. *Id.*

reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821), *quoted in Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992); *accord United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) ("Binding circuit law comes only from the holdings of the court, not from its dicta.") (brackets and citation omitted).

The *PanAmSat* Court did not even purport to investigate the "possible bearing" on the fees at issue of:

- (1) the twin phrases "47 CFR Part 25" and "Radio Facilities" in Section 9, which collectively limit the reach of the space station fee to apply only to U.S.-licensed space stations, *see* COMSAT Br. at 30-32; *supra* Section I.A. at p.6;
- (2) the language in the IOIA immunizing the "property and assets" of immune international organizations (including INTELSAT) from taxation, regardless of who "holds" those assets, *see supra* Section I.A. at pp. 6-7; and
- (3) the language in the INTELSAT Agreement clearly placing "ownership" of the satellites at issue in INTELSAT, not COMSAT, *see* COMSAT Br. at 4-6; *supra* Section I.A. at p. 7.

Because the *PanAmSat* Court never considered any of these issues, no *dicta* in *PanAmSat* can "control the judgment" here. *Cohens*, 19 U.S. (6 Wheat.) at 399-

400. By relying upon misinterpreted judicial *dicta* instead of performing the judicially-directed textual analysis, the FCC failed to fulfill the *PanAmSat* Court's mandate.

C. Section 9 Regulatory Fees Are Distinct From Section 8 Application Fees.

In an attempt to conflate Section 8 application fees with Section 9 regulatory fees, the FCC relies repeatedly upon the *PanAmSat* Court's passing supposition that COMSAT's responsibility to pay Section 8 fees in connection with INTELSAT satellites might suggest that COMSAT also should be subject to Section 9 fees in connection with the same facilities. *See, e.g.*, FCC Br. at 30 (discussing *PanAmSat*, 198 F.3d at 895); *id.* at 24 (same). In other circumstances, this assumption might be reasonable. In this context, however, the plain text of Sections 8 and 9 makes clear that the *PanAmSat* Court's supposition was mistaken. As discussed in Part I. *supra*, Section 9 regulatory fees—which are intended to recover the costs of the FCC's ongoing regulatory enforcement of its rules—apply only to satellites whose “radio facilities” are regulated by the FCC pursuant to “47 CFR Part 25.” 47 U.S.C. § 159(g) (table). By contrast, Section 8 application fees apply to all applications filed, without regard to either of Section 9's express limitations. *See id.* § 158(g) (table) (1994 & Supp. 2000); *see also* COMSAT Br. at 37-39.

The applications COMSAT submitted to the FCC do not concern the ongoing operation of INTELSAT "radio facilities." Nor, indeed, do they concern any matters regulated by the FCC pursuant to "47 CFR Part 25." Instead, those applications are required in connection with the FCC's review of COMSAT's financial participation in the procurement of INTELSAT satellites. *See, e.g., COMSAT Corp., Application for Authority to Participate in the Launch of the INTELSAT VIII-A (F-5)*, 13 F.C.C. Rcd 16627, 16627-628 (1998) ("*INTELSAT VIII-A Order*") (reviewing only the costs of COMSAT's proposed investments; *not* reviewing INTELSAT's proposed use of its radio facilities to transmit emissions through the radio spectrum). The costs of that review are covered by Section 8 fees and, once that review has been completed, the FCC incurs no additional regulatory costs because the satellites themselves are not subject to its jurisdiction. Accordingly, COMSAT's submission of Section 8 applications is irrelevant to the question of whether COMSAT must pay Section 9 regulatory fees for the INTELSAT satellites.

III. REVERSAL OF THE FY 2000 ORDER WILL NOT CAUSE COMSAT'S COMPETITORS TO PAY ADDITIONAL SECTION 9 REGULATORY FEES.

The FCC contends that, if it does not recover its costs of regulating COMSAT's Signatory activities from COMSAT, those costs will necessarily be

"shifted to other regulated entities that provide competing services." FCC Br. at 13. This "free rider" claim was never persuasive, but whatever validity it may have had has been completely eliminated by the recent privatization of INTELSAT.

Despite the FCC's suggestions to the contrary, the congressionally-mandated fee program is *not* designed to recover all of the Commission's costs. Since the program's enactment, fees have funded anywhere from "38 percent to approximately 87 percent" of the FCC's budget. *Summary of Testimony of FCC Chairman Michael K. Powell Before the Subcomm. on Commerce, Justice, State and the Judiciary of the Senate Comm. on Appropriations* (June 28, 2001), available online at <<http://www.fcc.gov/Speeches/Powell/Statements/2001/stmkp128.html>> (visited July 26, 2001). Congress has continued to fund the balance of the FCC's operations through direct appropriations. *id.*, and any FCC regulatory costs not recoverable under Section 9 are automatically underwritten by Congress. For example, in fiscal year 2000, Congress committed to funding at least \$24,246,000 of the FCC's budget directly. In so doing, Congress manifested its understanding that not all of the FCC's costs would be recovered through regulatory fees. Congress is well aware, for example, that the IOIA proscribes the agency from recovering from INTELSAT costs it may incur with regard to

INTELSAT's activities. Cf. H.R. Rep. No. 102-207, at 26 (Section 9 regulatory "[f]ees will not be applied to space stations operated by international organizations subject to the [IOIA]"). Accordingly, the FCC errs when it asserts that any regulatory costs not paid by COMSAT must necessarily be paid by COMSAT's competitors. See FCC Br. at 32-33.

In any event, because (as discussed *supra* note 1) INTELSAT has now been privatized and COMSAT is no longer the U.S. Signatory, the only periods for which COMSAT will be charged the space station fees at issue are fiscal years 2000 and 2001.¹⁰ COMSAT has already paid the fees under protest for fiscal year 2000; the FCC has already set the amount of the fee for fiscal year 2001; and by the time of oral argument, COMSAT will have paid (under protest) for that year as well. If COMSAT ultimately obtains a refund of the disputed amounts, the FCC will not seek to recoup those amounts from COMSAT's competitors or any other fee payers, any more than it did when it had to refund the unlawful Signatory fee. Rather, COMSAT will be reimbursed by the U.S. Treasury. The FCC's attempt to raise the shibboleth of "cost shifting" must be rejected.

¹⁰ In all subsequent years, this obligation will fall to Intelsat LLC, as the U.S.-licensed operator of the now-privatized INTELSAT system.

IV. THE COMMISSION FAILS TO DEFEND ITS ARBITRARY AND CAPRICIOUS REFUSAL TO PRORATE ANY REGULATORY FEES THAT MIGHT BE ASSESSED AGAINST COMSAT.

The FCC's brief ignores most of COMSAT's arguments concerning why proration would be justified in the event the Court were to find that space station regulatory fees may be imposed on COMSAT in connection with INTELSAT space stations. Instead, the agency makes a series of irrelevant observations and then tries to weave those comments into a coherent response. That effort fails.

First, the Commission asserts that proration is inappropriate because COMSAT is the "sole U.S. investor" in INTELSAT and the only U.S. user authorized to participate in the launch of INTELSAT satellites. FCC Br. at 37. However, those statements provide no basis for singling out COMSAT to pay 100 percent of any regulatory fees assessed against INTELSAT space stations. While COMSAT, as U.S. Signatory, was the statutorily-designated U.S. investor in INTELSAT during fiscal year 2000, COMSAT was just one of six INTELSAT Signatory/investors with U.S. subsidiaries, parents, or affiliates that also provided INTELSAT service in the United States. See COMSAT Br. at 19-20 n.12 (identifying the other five). Moreover, the authorizations on which the FCC relies expressly recognize that COMSAT has only a minority interest in INTELSAT satellites. See, e.g., *INTELSAT VIII-A Order*, 13 F.C.C. Rcd at 16628 (noting

COMSAT's then "current ownership share of 17.95%"). Thus, far from supporting the FCC's refusal to prorate, these orders actually demonstrate that proration would be appropriate.

Second, the Commission points out that COMSAT's Section 8 application fees have not been prorated, and seeks an "explanation why Section 9 fees must be prorated on the basis of Intelsat ownership or usage, but Section 8 [fees] need not." FCC Br. at 37. The explanation is this: the COMSAT applications at issue here concern the investment of COMSAT's money—and no one else's—in new INTELSAT projects. Accordingly, the "benefits" of the FCC's review of those applications run directly and exclusively to COMSAT. In contrast, the benefits of INTELSAT's operation of its 17-satellite global fleet run to hundreds of INTELSAT Signatories and direct access users, of which COMSAT is only one.

Third, the FCC asserts that it "previously rejected proposals to base the space station fee on usage." FCC Br. at 38. In fact, as the language quoted in the agency's brief shows, the FCC did no such thing; rather, it rejected proposals to assess the fee on a "per transponder," rather than "per satellite," basis. *Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Report and Order*, 10 F.C.C. Rcd 13512, 13550-551 (1995). It is indeed true that a satellite's *capacity* generally has no bearing on the amount of the space station fee. Thus, for

example, even if one U.S.-licensed satellite can carry twice as much traffic as another, both satellites presumptively must pay the same annual regulatory fee. However, that fact does not provide a rationale for requiring COMSAT to pay 100 percent of fees assessed on satellites that COMSAT does not own, operate, or, in some cases, even use to provide service.

COMSAT has not sought proration on the ground that INTELSAT satellites are smaller, or contain fewer transponders, than those of its competitors. Nor has COMSAT predicated its claim for proration on the fact that it has sublet to its customers a portion of the satellite space segment capacity that it leases from INTELSAT. Rather, COMSAT's claim is based on the fact that it is unable to access more than a small portion of the satellites' capacity because the satellites' owner—INTELSAT—leases the vast majority of that capacity to other users.¹¹

¹¹ In this regard, and contrary to PanAmSat's spurious claims, the Commission is well aware that COMSAT does not have "access to 100 percent of the capacity on Intelsat's satellites." PanAmSat Br. at 19. *See Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly*, 15 F.C.C. Rcd 19160, 19175 (2000) (finding that "both Comsat and direct access users . . . have reported difficulty in obtaining [INTELSAT] capacity to satisfy customer needs. The difficulties primarily are due to capacity shortages caused by high demand. . . ."). For this reason, it is fanciful for PanAmSat to suggest that COMSAT's 17 percent utilization somehow reflects the fact that COMSAT "has been able to sell only 17 percent of the capacity." PanAmSat Br. at 19. To the contrary, the very purpose of INTELSAT—to operate "a single global commercial telecommunications satellite (continued)

COMSAT's situation is thus quite different from that of an owner/licensee who chooses to sublet some of its transponders to a third party. In such a case, the licensee could require the lessee to pay a portion of the regulatory fees as a term of the lease (or could simply factor the cost of such fees into the lease price for the satellite capacity). In contrast, COMSAT has no ability to prevent the hundreds of other INTELSAT Signatories and direct access users the world from obtaining their own satellite capacity directly from INTELSAT.

Finally, even though Section 9(g) generally requires space station regulatory fees to be applied "per space station." Section 9(d) provides for exceptions to this general rule by allowing the FCC to "waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 159(d) (1994 & Supp. 2000). On at least one occasion, in a similar circumstance involving another "shared" satellite system, the FCC applied Section 9(d) to arrive at an appropriate proration of this fee. See COMSAT Br. at 55-57 (discussing *Application of Columbia Communications Corp.: For Partial Waiver of Its Regulatory Fee Payment for Two Geostationary*

system . . . which will provide expanded telecommunications services to all areas of the world." INTELSAT Agreement Preamble, 23 U.S.T. at 3814—would be thwarted if a single U.S. company were able to procure for itself all of the world's INTELSAT capacity.

Space Stations, 14 F.C.C. Rcd 1122 (1999)). Here, COMSAT has shown ample "good cause" why its claim for proration to reflect the company's 17 percent utilization share in INTELSAT is at least as compelling as the proration claim that was sustained by the FCC in *Columbia*. See COMSAT Br. at 54-58. Yet the FCC's brief does not even address any of the arguments on this point advanced in COMSAT's brief. See FCC Br. at 38-39.

CONCLUSION

For the reasons set forth herein, COMSAT's petition for review should be granted and the pertinent portions (Paragraphs 16-27 & 48-50, and Attachment A Paragraph 29) of the Commission's *FY 2000 Order*, 15 F.C.C. Rcd at 14485-490, 14497, 14516 (J.A. 6-8, 12, 21), imposing regulatory fees on COMSAT for satellite capacity owned by INTELSAT should be vacated. COMSAT requests a refund of all Section 9 regulatory fees for INTELSAT space stations that it paid pursuant to the *FY 2000 Order* (\$1,609,050), plus interest calculated from September 15, 2000, up to and including the date of the refund.

If, *arguendo*, fiscal year 2000 regulatory fees may be assessed against COMSAT in connection with INTELSAT space stations, then such an assessment should be prorated and COMSAT should recover a partial refund as detailed in COMSAT's Initial Brief.

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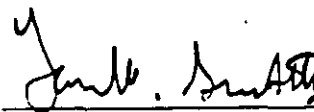
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2001, I caused copies of the foregoing "Final Reply Brief for Petitioner" to be dispatched by first-class mail, postage prepaid, to the following:

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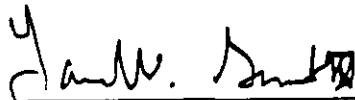


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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I hereby certify that, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2), this brief complies with the applicable type-volume limitations: it contains 6,728 words as counted by Microsoft Word 6.0, the word-processing software used to prepare this brief.



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August 13, 2001